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Graham Automotive, Inc., d/b/a Valley Honda and District Lodge 98, International Association of Machinists and Aerospace Workers, AFL-CIO, CLC. Case 6-CA-34581

July 28, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND WALSH

On February 8, 2006, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified and set forth in full below.²

On January 27, 2004, the Board certified District Lodge 98, International Association of Machinists and Aerospace Workers, AFL-CIO, CLC (the Union), as the exclusive collective-bargaining representative of the Respondent's automotive service technicians and team leaders at its Monroeville, Pennsylvania, automobile dealership. The parties thereafter commenced negotiations for a collective-bargaining agreement. The judge found that the parties reached a complete agreement on terms and conditions of employment and that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by refusing to execute a written contract incorporating the agreed-upon terms.

The Respondent argued to the judge, and now argues here, that its action was not unlawful because complete agreement was never reached on four provisions: (1) Union Seniority (art. 16); (2) Sickness and Accident Benefits (art. 32); (3) Working on Personal Cars (art.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We have modified the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), *Excel Container*, 325 NLRB 17 (1997), and *Ferguson Electric Co.*, 335 NLRB 142 (2001), and to conform to standard remedial language. We have substituted a new notice that reflects these changes.

39); and (4) Alcoholism and Drug Abuse Program (art. 40). The judge rejected this contention. For the reasons set out below, we also find the Respondent's argument without merit.

It is well settled that an employer violates Section 8(a)(5) and (1) of the Act by refusing to execute a written contract incorporating the terms of a collective-bargaining agreement reached with the union representing its employees.³ A threshold question is whether the parties in fact "had a 'meeting of the minds' on all substantive issues."⁴ As fully explained below, we find that the parties had reached a meeting of the minds on the above four provisions by January 24, 2005,⁵ at the latest. There was, therefore, a complete agreement by that date. Consequently, the Respondent violated Section 8(a)(5) when it refused the Union's January 31 request to execute a written contract embodying the parties' agreement.⁶

(1) *Union Seniority*: This article of the agreement set out the Respondent's seniority policies applicable to layoffs and promotions, among other things. In the Union's initial proposal, a key paragraph of the article provided:

The principle of seniority shall govern and control in all cases of promotion within the bargaining unit, transfer, decrease or increase of the working force as well as preference in assignment to shift work and choice of vacation period.⁷

The judge found that agreement was reached on this article on November 17, 2004, when the Union agreed to the Respondent's proposal to add the phrase "with the ability to do the job" after the word "seniority" in the paragraph.

³ *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 525, 526 (1941); *Buschman Co.*, 334 NLRB 441 (2001).

⁴ *Cross Island Telephone Services*, 330 NLRB 19, 23-24 (1999).

⁵ All dates hereafter refer to 2005 unless otherwise indicated.

⁶ The judge properly found that the collective-bargaining agreement should be given retroactive effect to January 7, the effective date specified in article 41 of the agreement (GC Exh. 15). See, e.g., *Provident Nursing Home*, 345 NLRB No. 40, slip op. at 4 (2005) (employer that refused to execute contract ordered to make agreement retroactive to effective date specified in agreement); *Ethan Enterprises*, 342 NLRB 129, 135 (2004) (same), *enfd.* mem. 154 Fed. Appx. 23 (9th Cir. 2005).

We also agree with the judge that the decertification petition filed with the Region on February 9 did not excuse the Respondent's failure to execute the contract. See, e.g., *Flying Dutchman Park, Inc.*, 329 NLRB 414, 417 (1999) (employer's assertion of good-faith doubt about incumbent union's continued majority status, which was based on events—including filing of decertification petition—occurring after final agreement on substantive terms of collective-bargaining agreement had been reached, not a defense to a refusal to execute an agreed-upon contract); *Dresser Industries, Inc.*, 264 NLRB 1088, 1089 (1982) (mere filing of decertification petition does not permit an employer to refuse to execute contract with incumbent union).

⁷ GC Exh. 6b.

The judge's finding is supported by the evidence. On November 24, 2004, Union Business Representative Todd Fichera faxed what was then "the latest version of the contract" to the Respondent's attorney, John O'Connell. This version incorporated the changes to the Union Seniority provision made at the November 17, 2004 negotiating session, so that the above paragraph read as follows:

The principle of seniority with the ability to do the job shall govern and control in all cases of promotion within the bargaining unit, decrease or increase of the working force.⁸

This paragraph, and the rest of the article, remained unchanged in the version of the agreement that was ratified by the Union's members on January 7,⁹ and in the final corrected agreement that Fichera faxed to O'Connell on January 28.¹⁰ Thus, we find that the parties had reached agreement on the Union Seniority provision.¹¹

(2) *Sickness and Accident Benefits*: This provision set out the changing percentage of base pay that an employee would receive after being out sick or disabled for a specified number of days. On November 17, 2004, Respondent's attorney O'Connell gave the Union the choice of the Union's proposed plan or the Respondent's current plan. O'Connell said that he would later provide the Union with the specific pay and days-absent figures applicable to the Respondent's plan. The agreement voted on by the membership at the January 7 ratification meeting specified "the current company plan" with the handwritten notation "list increments."¹² Union Business Representative Fichera testified that the members "ratified the company's current plan pending the language from Mr. O'Connell."¹³ O'Connell faxed this information to Fichera on January 24,¹⁴ and the same information was incorporated into the agreement that was presented to the Respondent on January 31.¹⁵ Thus, we find that complete agreement was reached on this provision no later than January 24, when O'Connell pro-

vided the pay and days-absent figures for the Company's plan.

(3) *Personal Cars*: This article set out a policy governing employees' use of the Respondent's facility to work on their own cars. Union Business Representative Fichera testified without contradiction that the Respondent presented this proposal.¹⁶ The language at issue specified whom employees should contact with questions about the policy. Fichera's November 24, 2004 fax to O'Connell of the latest version of the contract included the following provision: "If you have any questions about this policy or would like an exception to this policy, see Tom or Dave."¹⁷ At the Union's January 7 ratification meeting, the membership stated that job titles should be used instead of names, in the event that Tom or Dale did not remain in those positions. A handwritten notation on the copy of the contract used at the ratification meeting shows "DALE" and "Position."¹⁸ As found by the judge, the Respondent, too, wished to make this change in language. Accordingly, on January 24, O'Connell sent a fax to Fichera that included this change, so that the final language read: "If you have any questions about this policy or would like an exception to this policy, see the service manager or parts manager."¹⁹ Inasmuch as the substitution of job titles for the individuals' names was a nonsubstantive change, it appears that the parties actually had reached agreement on this provision by November 24, 2004. Certainly, though, they reached agreement no later than January 24, when O'Connell faxed the final language to the Union.

(4) *Alcoholism and Drug Abuse Programs*: This article of the agreement set out the joint company-union alcohol and drug dependency program. It enumerated the policies behind the program, the various stages of the program, and the mechanics of its operation. The paragraph at issue here concerned the program's compliance with Federal regulations. The "latest version" of the contract, which Fichera faxed to O'Connell on November 24, 2004, provided: "Any such program must comply with the regulations promulgated by the Department of Health and Human Services."²⁰ The version of the agreement voted on at the ratification meeting on January 7 had the following handwritten notation at the end of that same sentence: "+ or D.O.T."²¹ On January 24, O'Connell faxed to Union Business Representative Fichera a ver-

⁸ GC Exh. 10.

⁹ GC Exh. 11.

¹⁰ GC Exh. 14. The "corrections" were two typographical errors noted by O'Connell.

¹¹ Fichera also testified that agreement was reached on this provision at the last negotiating session on November 17, 2004, when the Union dropped its demand for a union-security clause in exchange for "Union Seniority" and agreed to the Respondent's proposed "Management Rights" clause. This three-article deal resulted in the final agreement containing an open-shop provision (Tr. 82).

¹² GC Exh. 11. There is no dispute that the "increments" notation referred to the pay and days-absent figures promised by O'Connell.

¹³ Tr. 71.

¹⁴ GC Exh. 8.

¹⁵ GC Exh. 15.

¹⁶ Tr. 65.

¹⁷ GC Exh. 10. Although the agreement specified the name "Dave," it is undisputed that it should have been "Dale."

¹⁸ GC Exh. 11.

¹⁹ GC Exh. 8.

²⁰ GC Exh. 10.

²¹ GC Exh. 11.

sion of the agreement that incorporated this “and/or” language, providing:

The Company will institute a drug and alcohol testing program which will be in compliance with the regulations promulgated by the Department of Health and Human Services and/or the United States Department of Transportation.”²²

This same language remained unchanged in the agreement that Fichera presented to the Respondent for its signature.²³ Thus, we find that complete agreement was reached on this provision no later than January 24, when O’Connell incorporated the Union’s “and/or” modification.

In sum, the evidence establishes that the parties reached a “meeting of the minds” on all substantive terms no later than January 24.²⁴ The Respondent thus violated Section 8(a)(5) and (1) of the Act when it refused to execute the written contract presented to it by the Union on January 31.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Graham Automotive, Inc., d/b/a Valley Honda, Monroeville, Pennsylvania, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith by refusing to execute the collective-bargaining agreement agreed upon with District Lodge 98, International Association of Machinists and Aerospace Workers, AFL–CIO, CLC (the Union) and forwarded to the Respondent on or about January 31, 2005. The Union is the exclusive collective-bargaining representative of all employees in the following unit:

All full-time and regular part-time automotive service technicians and team leaders employed by the Employer at its Monroeville, Pennsylvania facility; excluding office clerical employees and guards, professional

employees and supervisors as defined in the Act, and all other employees.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Forthwith, sign the collective-bargaining agreement agreed upon with the Union and forwarded to the Respondent on or about January 31, 2005.

(b) On the execution of the agreement, give effect to its provisions retroactive to January 7, 2005, and make its employees whole, with interest, for any loss of earnings and other benefits they may have suffered by reason of Respondent’s failure to sign the agreement, as set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility and place of business in Monroeville, Pennsylvania, copies of the attached notice marked “Appendix.”²⁵ Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or if it has closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 31, 2005.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region at-

²² GC Exh. 8.

²³ GC Exh. 15.

²⁴ Although Chairman Battista agrees with the judge and his colleagues that the Respondent violated Sec. 8(a)(5) by refusing to execute the agreement that was presented to it on January 31, he finds that a final agreement was reached no later than January 28. It was on January 28 that all of the negotiated provisions were incorporated into a unified document and Respondent’s counsel informed the Union that, except for a couple of typographical errors (about which there was no dispute), everything in that document was correct. Since the effective date of the contract was January 7, the difference between the Chairman’s view and that of his colleagues is without remedial significance.

²⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

testing to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 28, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with respect to wages, hours, and other terms and conditions of employment by refusing to execute the collective-bargaining agreement agreed upon and provided to us by District Lodge 98, International Association of Machinists and Aerospace Workers, AFL-CIO, CLC (the Union) on or about January 31, 2005. The Union is the exclusive bargaining representative of the following unit:

All full-time and regular part-time automotive service technicians and team leaders employed by the Employer at its Monroeville, Pennsylvania facility; excluding office clerical employees and guards, professional

employees and supervisors as defined in the Act, and all other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights as set forth above.

WE WILL execute the agreed-upon collective-bargaining agreement, and WE WILL give effect to that agreement retroactive to January 7, 2005.

WE WILL make you whole, with interest, for any loss of earnings and other benefits you may have suffered as a result of our refusal to execute the agreement.

GRAHAM AUTOMOTIVE, INC., d/B/A VALLEY HONDA

Gerald McKinney, Esq., for the General Counsel.
John M. O'Connell, Jr., Esq. (O'Connell & Silvis, LLP), of Greensburg, Pennsylvania, for the Respondent.
Todd Fichera, Business Representative, of Pittsburgh, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On March 15, 2005, a charge in Case 6-CA-34581, was filed against Graham Automotive, Inc., d/b/a Valley Honda (the Respondent), by District Lodge 98, International Association of Machinists and Aerospace Workers, AFL-CIO, CLC (the Union).¹

On April 20, 2005 the National Labor Relations Board, by the Regional Director for Region 6, issued a complaint, which as amended at the hearing, alleges that Respondent violated Section 8(a)(1) and (5) and 8(d) of the National Labor Relations Act, herein the Act, when it failed and refused the Union's request to execute the written contract containing the agreement on terms and conditions of employment agreed to by Respondent and the Union.

Respondent filed an answer in which it denied it violated the Act in any way claiming that complete agreement on terms and conditions of employment had not been reached between Respondent and the Union and because a decertification petition has been filed by a number of employees.

A hearing was held before me in Pittsburgh, Pennsylvania, on November 1, 2005.

Upon the entire record in this case, to include posthearing briefs submitted by Counsel for the General Counsel and Counsel for Respondent, and giving due regard to the testimony of the witnesses and their demeanor, I make the following

I. FINDINGS OF FACT

At all material times, Respondent, a Pennsylvania corporation with an office and place of business in Monroeville, Pennsylvania (the Respondent's facility), has been an automobile dealership engaged in the retail sale and service of new and used automobiles.

¹ Formerly District Lodge 83 until December 31, 2004. On January 1, 2005, District 83 merged with District Lodge 98 and became District Lodge 98.

During the 12-month period ending December 31, 2004, Respondent, in conducting its business operations described above, derived gross revenues in excess of \$500,000.

During the 12-month period ending February 28, 2005, Respondent, in conducting its business operations described above, purchased and received at its Monroeville, Pennsylvania, facility goods valued in excess of \$50,000 directly from points located outside the Commonwealth of Pennsylvania.

Respondent admits and I find that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits and I find that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Overview

The following employees of Respondent (Unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time automotive service technicians and team leaders employed by the Employer at its Monroeville, Pennsylvania, facility; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act, and all other employees.

On January 16, 2004, a majority of the employees in the Unit designated and selected the Union as their representative for the purposes of collective bargaining with Respondent in a Board-conducted election in Case 6-RC-12294.

On January 27, 2004, the Union was certified as the exclusive collective-bargaining representative of the Unit.

At all times since January 27, 2004, based on Section 9(a) of the Act, the Union has been exclusive collective-bargaining representative of the Unit. The Union enjoyed a 1-year period from January 27, 2004 to January 27, 2005 when it had an irrebuttable presumption of majority support among the employees in the unit described above.

The Union and Respondent began negotiations for a first contract in early 2004. The parties had 11 face-to-face negotiating sessions beginning on February 24, 2004 and ending on November 17, 2004.²

The union negotiating team consisted of Union Business Representative Todd Fichera and two employees in the unit, Randall Campana and James Mendenhall. Respondent's negotiating team consisted of Respondent's owner, James Graham, and attorneys John M. O'Connell, Jr., and James Silvis although Silvis was not at every negotiating session.

Fichera testified that the parties had reached a tentative agreement on November 17, 2004 and that he told Respondent he would take the contract back to the members for a ratification vote but would not recommend it because the agreement

did not contain a union-security clause but instead provided for an open shop.

On January 7, 2005 the union members voted to ratify the agreement and Fichera so advised John O'Connell, Respondent's attorney and a member of Respondent's negotiating team.

The General Counsel and Union contend that complete agreement on terms and conditions of employment was reached by Respondent and the Union. The Union typed up a contract and it was presented to Respondent for execution on January 31, 2005 after being signed by the Union.

Respondent refused to sign the contract claiming that complete agreement had not been reached on terms and conditions of employment and that Respondent should not execute the agreement, even if complete agreement had been reached, because a decertification petition had been filed by some employees seeking to decertify the Union.

Section 8(a)(5) of the Act provides as follows "It shall be an unfair labor practice for an employer—(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a). . . ."

Section 8(d) of the Act provides, in part, as follows:

(d) [Obligation to bargain collectively] For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and *the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .* (Emphasis added.)

The Union presented to Respondent at the first negotiating session a copy of a complete contract from which the parties began their negotiations eventually agreeing to a contract that had a term of approximately 17 months from January 7, 2005 to May 31, 2006.

I find that complete agreement was reached by the parties on the terms and conditions of employment.

Respondent argues that agreement was not reached on 4 subjects:

1. Article 32.1 sickness and accident benefits
2. Article 39.2(5) policy regarding employees working on their own cars.
3. Article 40.9 Drug and Alcohol Policy
4. Article 16 Union Seniority.

I conclude that the parties did reach complete agreement on terms and conditions of employment. I credit the testimony of Todd Fichera and Mary Lou Kanonik, who is a secretary to Todd Fichera. I do not credit James Graham.

I find that Respondent falsely claims that agreement wasn't reached to support its failure to execute the written agreement presented to it by the Union for signature on January 31, 2005. The real reason Respondent didn't sign the contract, I find, was

² The parties stipulated that they met in 2004 on the following dates, i.e., February 24, March 10, March 26, April 14, May 20, July 14, August 18, September 15, October 13, October 25, and November 17.

that it learned after complete agreement was reached that some of its employees in the certified unit were petitioning the Board to decertify the Union.

In *Dresser Industries*, 264 NLRB 1088 (1982), the Board held that “the filing of a decertification petition, standing alone, does not provide a reasonable ground for an employer to doubt the majority status of a union.” See also *Champ Corp.*, 291 NLRB 803 (1988); *Allied Industrial Workers v. NLRB*, 476 F.2d 868, 881–882 (D.C. Cir. 1973). It follows, that a withdrawal of recognition or a suspension of the employer’s ongoing obligation to bargain in good faith is not privileged on that ground. See, e.g., *Lee Lumber & Building Material*, 306 NLRB 408 (1992), and *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982).

The decertification petition filed with the Region on February 9, 2005 does not excuse an employer from bargaining in good faith and bargaining in good faith includes the execution, if requested, of a written contract embodying the terms of the agreement. In the instant case if Respondent violated the Act by not executing the agreement then the failure to have a signed contract will bar the processing of the decertification petition. Employee William Bonney had himself and two other employees sign an informal petition to decertify the Union typed up by Bonney’s wife and dated January 28, 2005. The Region then sent Bonney a formal decertification petition which Bonney signed and which was dated February 9, 2005.

B. Discussion

I will address each of the four areas where Respondent claimed there was no agreement reached.

1. Article 32.1 Sickness and Accident Benefits

On November 17, 2004, which was the last face-to-face negotiating session, Respondent and the Union agreed that the employees could have either the Union proposed sickness and accident plan or the then current company plan. At a ratification meeting on January 7, 2005 the employees voted and accepted the current company sickness and accident plan as well voting to ratify the contract.

John O’Connell was advised of this and sent by fax to the Union on January 24, 2005, a copy of the current company sickness and accident benefit plan and the Union incorporated it into the contract they presented to Respondent on January 31, 2005 for signature.

The agreed-upon article 32.1 read as follows:

ARTICLE 32—SICK AND ACCIDENT BENEFITS

32.1 Sick and accident benefits will be payable to an employee under the current company plan: Once you have worked one (1) year, you are covered by our short term disability compensation program. The program will pay you the following percentage of your base pay (see vacation pay for calculation of base pay) when you cannot work:

The first working day absent: no payment
 The second working day absent: 25% of base rate
 The third working day absent: 50% of base rate
 The fourth working day absent: 75% of base rate
 The fifth working day absent: 100% of base rate
 The sixth through 25th: 100% of base rate

You are eligible to use this program more than once per year, however the maximum days of coverage is 25 days per calendar year. The maximum coverage for one incident of disability is also 25 days even if it extends from one year to another. You must provide medical information from your doctor showing that you are unable to work to be eligible for this benefit. If the reason that you cannot work is covered by workman’s compensation, you may be eligible for other disability coverage. You are not eligible for both workman’s compensation and this coverage at the same time.”

2. Article 39.2 Sub 5 Working on Personal Cars

The policy proposed was to the effect that questions about the policy or requests for exceptions were to be addressed to Tom or Dale. Actually the proposal said Tom or Dave but Dave’s name is really Dale. Respondent wanted to substitute the position of service manager and parts manager for the names Tom and Dale on the theory that there may be turnover in those positions. Respondent faxed this proposal to the Union on January 24, 2005 which the Union incorporated into the written contract.

The final agreement on Article 39 was as follows:

ARTICLE 39—WORKING ON PERSONAL CARS

39.1 The Company shall maintain the current policy of employees working on their own car.

39.2 The Company policy for working on your car after hours is:

1. You can work on your own car or any car in your household after hours. (You are not allowed to work on friends’ cars, etc., for liability reasons.)
2. All work must be done while the shop is open. For example, if the other team is working until 7:00 p.m. and you were off at 4:30 p.m., you could work from 4:30 p.m. until 7:00 p.m. This is for safety reasons. We do not want someone working alone or when there is not a Service Manager on site.
3. You must have a repair order for the car. See any Service Advisor for an order.
4. Whatever you do must not interfere with normal business. You must work around any technicians on the clock.
5. If you have any questions about this policy or would like an exception to this policy, see the service manager or parts manager.”

3. Article 40.9 Alcoholism and Drug Abuse Program

The parties agreed back on October 13, 2004 on an alcohol and drug abuse program. It was article 40 and contained 10 subparts.

Respondent had a concern only with article 40.9, which provided as follows “The Company shall not implement any drug or alcohol testing program without first negotiating with the Union. Any such program must comply with the regulations promulgated by the Department of Health and Human Services.”

Respondent’s proposal on article 40.9 was faxed to the Union on January 24, 2005 and incorporated by the Union into the contract the Union presented to Respondent for execution on

January 31, 2005. It provided as follows: "The Company will institute a drug and alcohol testing program which will be in compliance with the regulations promulgated by the Department of Health and Human Resources and/or the United States Department of Transportation."

Article 40, in its entirety, provided as follows:

ARTICLE 40—ALCOHOLISM AND DRUG ABUSE PROGRAMS

JOINT COMPANY-UNION ALCOHOL AND DRUG DEPENDENCY PROGRAM

In order to assist employees afflicted with alcohol or drug dependency and to eliminate the safety risks which result from alcohol and drug abuse, the Company and the Union establish the following Joint Company-Union Alcohol and Drug Dependency Program:

40.1 The following are basic essentials for an effective alcohol and drug dependency program:

1. Participation in the program by an individual employee must be voluntary and will be kept confidential to preserve the employee's privacy.
2. Effectiveness of the program is directly dependent upon the degree to which the employee affirmatively seeks such voluntary participation.
3. Employees shall not be subject to Company discipline for voluntarily acknowledging a drug or alcohol dependency and seeking assistance. However, the Company's right to discipline an employee for unsatisfactory performance or attendance is not diminished or modified in any way by the fact that the employee may have an alcohol or drug problem. Disciplinary action for unsatisfactory performance or attendance may be held in abeyance during the employee's cooperative participation in the program, provided no further performance or attendance problems occur, and provided further that the Company will not discriminate in its decisions to defer imposition of discipline.

40.2 The program is divided into the following stages:

1. Identification
2. Evaluation
3. Treatment
4. Return to Work.

40.3 Identification

1. Identification of an employee as having an alcohol or drug problem which interferes with job performance or attendance can occur in several ways:

- (1) The individual employee acknowledges the problem and so advises a Company or Union representative.
- (2) Company's management or Union representatives become aware of the employee's performance or attendance problems and have some reason to be-

lieve the problems are alcohol or drug related. The belief must be based upon specific personal observations regarding the employee's appearance, behavior, speech or breath odor. Those observations shall be reduced to writing by the management or Union representative within twenty-four (24) hours of the behavior observed.

2. At this stage, a brief counseling session attended by the employee, his/her supervisor and, if requested by the employee, his/her Union representative, should be arranged and the following items covered: (If the employee so desires, a separate, private counseling session with his/her Union representative will be afforded prior to the Union representative's participation in the supervisor's counseling session with the employee.)

- (1) The employee shall have the opportunity to provide alternate (non drug or alcohol related) explanations for the observed behavior.
- (2) The program shall be clearly explained to the employee.
- (3) The facts that participation is purely voluntary and will be kept confidential should be emphasized.
- (4) It should be stressed that the extent of the employee's alcohol or drug problem, if any, has not yet been determined.
- (5) The employee should be advised that normal disciplinary action appropriate for his/her job performance or attendance problems may be held in abeyance so long as he/she cooperatively participates in the program, provided no further performance or attendance problems occur.
- (6) The session will conclude by advising the employee that, if agreeable, an appointment will be arranged with the Company Medical Department for a medical evaluation of the problem.

40.4 Evaluation

1. Because alcohol and drug problems vary considerably (their causes are innumerable, they may be temporary or of long duration, they may be acute or chronic, they may or may not involve serious physical deterioration), it is imperative that the scope of the employee's problem must be medically evaluated at the outset.

2. At the appointment with the Company Medical Department, the employee will be advised that:

(1) Evaluation of his/her alcohol or drug problem can be conducted by his/her selection of one of the following:

- (1) Company Medical Department.
- (2) Any one of a list of outside community resource organizations mutually agreed upon by the Company and the Union.
- (3) His/her personal selection of a medical expert in the field who is satisfactory to the Company and the Union.

(2) The result of the evaluation will become part of the employee's Company medical record, will be maintained in con-

fidential files separate from other personnel records, and will be provided to the employee and, if agreeable to him/her, to the Union.

(3) If the evaluation concludes that the employee does not have a significant alcohol or drug problem requiring further treatment, no further participation in the program is required.

(4) If the evaluation concludes that the employee has an alcohol or drug problem requiring treatment, such treatment by an outside organization or medical expert from a list agreed upon by the Company and the Union will be arranged by the Company Medical Department.

(5) The employee's participation in such treatment is voluntary. However, if the employee refuses such treatment or fails to cooperate in its successful completion, any disciplinary action for his/her job performance or attendance problems which have been held in abeyance may be taken.

40.5 Treatment

1. When the Evaluation Report indicates that treatment is necessary and the employee agrees in writing to participate, the Company's Medical Department will:

(1) Arrange with the employee and the selected treatment agency a schedule for treatment; and

(2) If necessary for treatment, arrange with the employee's Company a leave of absence for the period of the treatment. Such leaves of absence shall not be considered breaches in service for purpose of accruing rights and benefits under this contract and/or any benefit plan.

2. If the employee continues to work during treatment, he/she will be subject to normal rules of conduct and performance.

40.6 Return to Work

1. If a leave of absence is required for the treatment of the employee's alcohol or drug related condition, the employee's return to work must be approved by the Company Medical Department.

2. Such approval will depend, in large measure but not exclusively, on the recommendation of the outside treatment agency or expert as to the employee's successful completion of the treatment. In the event the Company Medical Department refuses to permit an employee to return to work after the employee has been released by the outside treatment agency, the employee may select a third outside community resource organization from those approved by the Company and Union and the evaluation by that organization shall be binding on the parties.

3. An employee's failure to successfully complete the recommended course of treatment may result in termination of employment unless, in the opinion of the Company Medical Department, the employee is able to return to work. Such determination shall be subject to the Grievance Procedure.

40.7 Costs incurred by the employee for medical evaluation and treatment will be reimbursed under the Company's Group

Insurance Program subject to the requirements and limitations of that Program.

40.8 The Company and the Union will explore the desirability of organizing a Chapter of Alcoholics Anonymous comprised of eligible hourly employees who could provide counseling and other essential supporting services to employees participating in this program.

40.9 The Company will institute a drug and alcohol testing program which will be in compliance with the regulations promulgated by the Department of Health and Human Resources and/or the United States Department of Transportation.

40.10 Any employee who is found to be under the influence of drugs and/or alcohol during work hours shall have one (1) chance at rehabilitation. The employee must enroll in a rehabilitation program."

4. Article 16 Seniority

Agreement was reached on the article on November 17, 2004 when the Union agreed to add the language "with the ability to do the job" in article 16.2; which, as modified, reads as follows:

The principle of seniority with the ability to do the job shall govern and control in all cases of promotion within the bargaining unit, decrease or increase of working force.

The entire article is as follows:

ARTICLE 16—SENIORITY

16.1 The length of service of the employee in the Company shall determine the seniority of the employee.

16.2 The principle of seniority with the ability to do the job shall govern and control in all cases of promotion within the bargaining unit, decrease or increase of the working force.

16.3 The Company shall give due consideration to promoting current employees before hiring new employees.

16.4 All new employees shall, for the first forty-five (45) days of their employment, be considered probationary employees. If retained after the forty-five (45) day period, these employees shall be placed upon the seniority list with seniority as of the date of hiring. All such employees may be dismissed during this forty-five-(45) day period for cause.

16.5 The right of seniority in reemployment shall be accorded to a laid-off employee prior to new employees being hired, provided such laid-off employee responded to a call to report for work not more than five (5) working days after receipt of notice sent to him by registered mail to his last known post office address. If such laid-off employee fails to report for work within fifteen (15) days, he shall lose all rights of seniority, unless he is temporarily incapacitated, preventing him from reporting, or is employed elsewhere, in which case he must notify the Company in writing within five (5) days after the receipt of the notice to return that he will report to work as quickly as his health or temporary employment will permit. Recall rights from layoff shall cease after an employee is laid off for a period of two (2) years.

16.6 The Company shall prepare and maintain, subject to examination and correction by Union representatives, a seniority list by shop and classification to record the status of each employee in the unit. The Union shall be provided with a copy of the seniority list and shall be notified of all changes. Each employee shall have the right to protest any error in his seniority status.

16.7 Shop stewards shall be given seniority over all employees whom they represent during reduction in forces, provided work in their classification or work in classifications to which they have a displacement right is available, and so long as the official's duties would permit such seniority preference under existing law.

If for any reason an employee ceases to hold one of the specified union positions and, as a result, no longer has sufficient natural seniority to remain in the classification, the employee shall be transferred or subject to layoff in accordance with the seniority principles of this Agreement. The Union shall promptly notify the Company in writing when there is a change in the designation of shop stewards or members of shop committees.

16.8 Seniority rights of a laid-off employee will continue to accumulate while he is laid off for a period of two (2) years.

16.9 Seniority shall be lost for the following reasons only:

- Voluntary quitting.
- Discharge for just cause.
- Failure to return to work as required in paragraph 16.5 hereof.

It is obvious that complete agreement was reached in these four areas.

A copy of the 25-page collective-bargaining agreement was sent to attorney John O'Connell and he found only two minor typographical errors, i.e., on page 18, which was part of article 32–Sickness and Accident Benefits—where the word “sixty” should be “sixth” and the word “form” should be “from.” Those two typographical errors were corrected by Fichera's secretary.

Business Representative Fichera's secretary, Mary Lou Kanonick, spoke with John O'Connell about the two typos and asked him if everything else in the contract was correct and John O'Connell said yes.

I credit Kanonick's testimony that O'Connell said everything in the contract was okay except for the two typos. She appeared honest and most significantly she was not contradicted by any other testimony. O'Connell never testified that he did not say that to Kanonick.

On January 31, 2005 Fichera spoke with John O'Connell twice. In the first call Fichera said the Union was taking the contract to Respondent's facility for signature and O'Connell said fine. In the second call O'Connell told a supervisor at Respondent's facility to let two unit employees who were working sign the collective-bargaining agreement. Clearly, O'Connell, a trained lawyer, thought the parties had a complete agreement. O'Connell did not testify. Fichera's testimony was uncontradicted.

C. Decertification Petition

Sometime in early February 2005 Respondent's President James Graham found out that some employees were trying to decertify the Union and, I find, that is why he did not sign the contract agreed to by the parties.

In his testimony at the hearing on the decertification petition on February 16, 2005, Graham said he didn't sign the contract because of the petition. He never once testified that agreement had not been reached on the terms and conditions of employment.

Only after the charge was filed in this case on March 15, 2005 did Graham, in his affidavit to the Board dated March 23, 2005, claim that agreement had not been reached on the four subjects discussed above.

CONCLUSIONS OF LAW

1. Respondent, Graham Automotive, Inc., d/b/a Valley Honda, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. District Lodge 98, International Association of Machinists and Aerospace Workers, AFL–CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time automotive service technicians and team leaders employed by the Employer at its Monroeville, Pennsylvania, facility; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act, and all other employees.

4. At all times material, the Union has been the exclusive collective-bargaining representative of the employees in the unit found appropriate for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By failing and refusing to execute and sign the collective-bargaining agreement agreed to by the Union and Respondent and provided by the Union to Respondent on or about January 31, 2005, Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(1) and (5) and Section 8(d) of the Act.

6. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices proscribed by Section 8(a)(1) and (5) and Section 8(d) of the Act, I recommend that it cease and desist therefrom and that it take certain affirmative action designed to remedy the unfair labor practices and to effectuate the policies of the act. Specifically, I shall recommend that Respondent forthwith sign the collective-bargaining agreement embodying the terms of the agreement between Respondent and the Union and that it give effect to such agreement retroactively to January 7, 2005, when agreement was reached; and that it make whole its employees for losses, if any, which they may have suffered as a result of Respondent's failure to sign or to honor the agreement, in the manner set forth in *Ogle Protection Service*, 183 NLRB 682

(1970), with interest thereon as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Graham Automotive, Inc., d/b/a Valley Honda, Monroeville, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the Union by refusing to execute the collective-bargaining agreement agreed on with the Union and forwarded to Respondent on or about January 31, 2005.

(b) The Union is the exclusive collective-bargaining representative of all employees in the following unit:

All full-time and regular part-time automotive service technicians and team leaders employed by the Employer at its Monroeville, Pennsylvania, facility; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act, and all other employees.

(c) In any like or related manner interfering with, restraining, or coercing you in the exercise of the rights guaranteed you by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Forthwith sign the collective-bargaining agreement described in paragraph 1(a) of this Order.

(b) On the execution of the agreement give retroactive effect to the provisions thereof and make its employees whole for any losses they may have suffered by reason of Respondent's failure to sign the agreement, as set forth in the remedy section of the decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility and place of business, in Monroeville, Pennsylvania, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional

Director for Region 6, after being duly signed by the authorized representative, shall be posted immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 21 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C., February 8, 2006.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain with respect to wages, hours, and other terms and conditions of employment with the Union by refusing to execute the collective-bargaining agreement agreed upon and provided to us by the Union on or about January 31, 2005. The Union is the exclusive bargaining representative of the following described unit:

All full-time and regular part-time automotive service technicians and team leaders employed by the Employer at its Monroeville, Pennsylvania, facility; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act, and all other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Federal Law.

WE WILL execute the agreed-upon collective-bargaining agreement and give effect to that agreement retroactive to January 7, 2005.

GRAHAM AUTOMOTIVE, INC. D/B/A VALLEY HONDA

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."